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JUSTICE ACCORDING TO LAW.[1]

THE only essential conditions for the existence of law and legal institutions are the existence of a political community, and the recognition by its members of settled rules binding upon them in that capacity. Those conditions are present in all societies of men who are not mere savages. Even among civilized men, on the other hand, they may be suspended in particular circumstances.

We can get one example by supposing a boat's crew from a wrecked ship, made up of different nationalities in about equal proportions, to land on an island in the high seas which is neither occupied nor claimed by any civilized power. Such a party would, it is conceived, be remitted to what was once called "the state of nature," aided by whatever conventions they might agree upon as appropriate to their situation. A lawyer would probably advise them to consider themselves as still under the law of the ship's flag; but it is difficult to say that this or any other law would have any real authority apart from the agreement of the whole party.

Practically, the law of nature, or, in less ambiguous terms, the common rules of civilized morals and the dictates of obvious expediency, would have to suffice for the present need.

Again, it is not very difficult for civilized men to find themselves, without any violent accident, in places where it is hard to say

[1] A public Lecture delivered in the University of Oxford, 1895.

whether any, and, if any, what law prevails in the ordinary sense. Take the case of an English or American traveller, or an Englishman and an American travelling together, in the region of the Khaibar Pass beyond the British frontier post at Fort Jamrud and before Afghan territory is reached. Certainly they are not subject to the law of British India, still less, if possible, to the law of Islam as applied in Afghanistan. Yet the persons and property of those who go up the Pass on the appointed days and with the proper escort are really safer than they would be in some parts of almost any European or American city. But peculiar phenomena of this kind, which are transitory accidents as compared with the ordinary course of civilized life, do not affect the normal operation and effects of civilized law, nor throw any light on its origin. If, on the other hand, a new social combination, which at first sight may have been precarious, becomes permanent, its members acquire, by convention or by submission to an existing jurisdiction, some permanent form of government and law. The inchoate stages of this process — which in fact has taken place in various parts of the world, such as the extreme Western States of America, within living memory — are interesting in their own way, but are hardly within the province of the lawyer. Settled rules and recognized jurisdiction are the lawyer's tests.

Law presupposes ideas, however rudimentary, of justice. But, law being once established, *just*, in matters of the law, denotes whatever is done in express fulfilment of the rules of law, or is approved and allowed by law. Not everything which is not forbidden is just. Many things are left alone by the State as it were under protest, and only because it is thought that interference would do more harm than good. In such things the notion of justice has no place: the mind of the State is rather expressed by Dante's "guarda e passa." The words "just" and "justice," and corresponding words in other tongues, have never quite lost ethical significance even in the most technical legal context. The reason of this — unduly neglected by some moderns for the sake of a merely verbal and illusive exactness — is that in the development of the law both by legislative and by judicial processes appeal is constantly made to ethical reason and the moral judgment of the community. Doubtless the servants of the law must obey the law, whether specific rules of law be morally just in their eyes or not; this, however, is only saying that the moral judgment we regard is the judgment of the community, and not the particular opinion of

this or that citizen. Further, some conflict between legal and moral justice can hardly be avoided, for morality and law cannot move at exactly the same rate. Still in a well ordered State such conflict is exceptional, and seldom acute. Legal justice aims at realizing moral justice within its range, and its strength largely consists in the general feeling that this is so. Were the legal formulation of right permanently estranged from the moral judgment of good citizens, the State would be divided against itself.

We may better realize the fundamental character of law by trying to conceive its negation or opposite. This will be found, it is submitted, in the absence of order rather than in the absence of compulsion. An exercise of merely capricious power, however great in relation to that which it acts upon, does not satisfy the general conception of law, whether it does or does not fit the words of any artificial definition. A despotic chief who paid no attention to anything but his own whim of the moment could hardly be said to administer justice, even if he professed to decide the disputes of his subjects. The best ideal picture I know in literature of what might be called natural injustice, the mere wantonness of power, is exhibited in the ways of Setebos as conceived by Robert Browning's "Caliban": "As it likes me each time I do: so He." In the same master's "Pippa Passes," the song of the ancient king, who judged sitting in the sun, gives a more pleasing, though not a more perfect, image of natural or rather patriarchal justice. Absence of defined rule, it must be remembered, is not the same thing as the negation of order. The patriarch may not do justice according to any consciously realized rule, and yet his decrees are felt to be just, and will go to the making of rules of justice for posterity.

It is true that even in highly civilized States we meet with occasional or singular acts of sovereign power which are outside the regular course of justice and administration, and which nevertheless must be counted as laws. In form they do not differ from the ordinary acts of the law-making authority, and in substance they are laws in so far as they affect in some way the standing of individual citizens before the law, must be regarded and acted upon by the judges and other public servants of the State, and will at need be put in force by the executive. In some of these cases there is really nothing abnormal except the form of the transaction. What began with being a special exercise of supreme power for a special occasion has settled into a routine which, though in form

legislative, is in substance administrative or judicial, or partly the one and partly the other. Such is the case in this country with the private Acts of Parliament by which railway and other companies are incorporated, and have powers of compulsory purchase and the like conferred on them. So before the establishment of the Divorce Court the dissolution of marriages by a private Act of Parliament was a costly and cumbrous proceeding, but still of a judicial kind. In these and similar cases the form of legislation has been rendered necessary by historical or constitutional accident. Sometimes, again, the purpose of these extraordinary legislative acts is to relieve innocent persons, and those who may have to derive titles to property from them, from the consequences of some venial failure to comply with the requirements of law. Marriages between British subjects have often been celebrated in good faith, but in fact without authority, by British consuls and other official persons in remote parts of the world, and on the error being discovered Acts of Parliament have been passed to give validity to the marriages so celebrated. Acts of indemnity have much the same nature, so far as they relate to the neglect or omission of requirements which have come to be regarded as merely formal. When the Test Acts were in force there was an annual Act of Indemnity for the relief of those public officers (being in fact the great majority) who had not performed and observed all the conditions which at one time had been supposed, and for a time possibly were, needful precautions for securing the Protestant succession to the throne. Lastly, that which in form is an act of legislation may be a more or less thinly disguised act of revolution, civil war, or reprisal against unsuccessful revolution. Acts of Attainder are the best English example in this kind: they must be carefully distinguished from impeachment, which is a regular process known to the law, though an unusual one. All these matters have their own historical and political interest; but we have nothing to learn from them about the normal contents and operation of legal institutions. The Roman name of *privilegia* marks them off as standing outside the province of regular and ordinary law.

Let us pass on, then, to consider what are the normal and necessary marks, in a civilized commonwealth, of justice administered according to law. They seem capable of being reduced to generality, equality, and certainty. First, as to generality, the rule of justice is a rule for citizens as such. It cannot be a rule merely for the individual; as the mediæval glossators put it, there cannot

be one law for Peter and another for John. Not that every rule must or can apply to all citizens; there are divers rules for divers conditions and classes of men. An unmarried man is not subject to the duties of a husband, nor a trader to those of a soldier. But every rule must at least have regard to a class of members of the State, and be binding upon or in respect of that class as determined by some definite position in the community. This will hold however small the class may be, and even if it consists for the time being of only one individual, as is the case with offices held by only one person at a time. Certain rules of law will be found in almost every country to apply only to the prince or titular ruler of the State, or to qualify the application of the general law to him. In England, again, the Prince of Wales, as Duke of Cornwall, is the subject of rules forming a singular exception to the general law of property; and the Lord Chancellor has many duties and powers peculiar to his office. But these rules are not lacking in the quality of generality, for in every case they apply not to the individual person as such, but to the holder of the office for the time being. They may be anomalous with regard to the legal system in which they occur; and, like other rules of law, they may or may not be expedient on the particular merits of each case. They are not in any necessary conflict with the principles of legal justice merely because they are of limited. or unique application.

Next, the rule of generality cannot be fulfilled unless it is aided by the principle of equality. Rules of law being once declared, the rule must have the like application to all persons and facts coming within it. Respect of persons is incompatible with justice. Law which is the same for Peter and for John must be administered to John and to Peter evenly. The judge is not free to show favor to Peter and disfavor to John. As the maxim has it, equality is equity, though the working use of the maxim is not quite so simple as this. So much is obvious, and needs no further exposition. But it may be proper to point out that the rule of equality does not exclude judicial discretion. Oftentimes laws are purposely framed so as to give a considerable range of choice to judicial or executive officers as to the times, places, and manner of their application. It is quite commonly left to the judge to assign, up to a prescribed limit, the punishment of proved offences; indeed, the cases in which the court is deprived of discretion are exceptional in all modern systems. Apart from capital offences, there are only one or two cases in English criminal law where a minimum punishment is im-

posed, and none, it is believed, where there is no discretion at all. Certain remedies and forms of relief, in matters of civil jurisdiction, are said to be discretionary as contrasted with those which parties can demand as their right. Still, a judicial discretion, however wide, is to be exercised without favor, and according to the best judgment which the person intrusted with the discretion can form on the merits of each case. In various cases where the risk of discretion being perverted by outside influence or pressure has seemed greater than that of spontaneous partiality, the holders of discretionary power or authority are deliberately exempted from being called on to give an account of their reasons. In such cases the discretion is said to be not judicial but absolute. Examples are the protector of a settlement, and the governing bodies of schools under the Public Schools Act. Differences of personal character and local circumstances are often quite proper elements in the formation of such a judgment, but any introduction of mere personal favor is an abuse. We still aim at assigning equal results to equal conditions. Judicial discretion is not an exception to the principle of equality, but comes in aid of it where an inflexible rule, omitting to take account of conditions that cannot be defined beforehand, would really work inequality. This implies that only such conditions are counted as are material for the purposes of the rule to be applied. Of course no two persons or events can be fully alike. What rules of law have to do is to select those conditions which are to have consequences of certain kinds; which being done, it is the business of the courts to attend to all those conditions, and, saving judicial discretion where it exists, not to any others. A plaintiff who argues his case in person may be tedious and offensive, but the judge must nevertheless do him justice as fully as if his argument were excellent. This may seem too obvious for statement in England, but there are parts of the British Empire where it is not, or within recent times was not so. Suppose, on the other hand, it were a rule of law that no man who wore a white hat before May-day could take a legacy within the year. It would not be competent to any court to say that, as between A. and B., rival claimants for the same legacy, the legacy should be paid to A., notwithstanding that he had worn a white hat in April, because he was a poor man and more in want of money than B. The law cannot make all men equal, but they are equal before the law in the sense that their rights are equally the subject of protection and their duties of enforcement.

Further, as the requirement of generality leads to that of equality, so does the requirement of equality lead to that of certainty, which brings in its train the whole scientific development of law. We must administer a general rule, and administer it equally. There can be no law without generality; there can be no just operation of law without equality. But we cannot be sure of a rule being equally administered at different times and in the cases of different persons unless the rule is defined and recorded. Justice ought to be the same for all citizens, so far as the material conditions are the same. Now to carry out this idea the dispenser of justice ought to be adequately furnished with two kinds of information. He should know what is accustomed to be done in like cases, and whenever new conditions occur he should know, or have the means of forming a judgment, which of them are material with a view to legal justice and which are not. Moreover, there must be some means of securing an approximate uniformity of judgment; otherwise judges and magistrates of all degrees will make every one a law of his own for himself, and the principle of equality will not be satisfied. Justice dealt out according to the first impression of each particular case, the "natural justice" of an Eastern king sitting in the gate, is tolerable only when the community is small enough for this function to be in the hands of one man, or very few, and its affairs are simple enough for off-hand judgments not to produce results of manifest inequality. This is as much as to say that in a civilized commonwealth law must inevitably become a science. The demand for certainty becomes more exacting as men's affairs become more complex, and the aid of the courts is more frequently sought. Trade and traffic, in their increasing volume, speed, and variety of movement, raise new questions at every turn, and men expect not only to get their differences settled for the moment, but to have solutions which will prevent the same difficulties from giving trouble again. How far would natural justice carry us, for example, towards a settlement of the problems involved in making contracts by letter, telegraph, or telephone?

Hence law becomes an artificial system, which is always gathering new material. The controverted points of one generation become the settled rules of the next, and fresh work is built up on them in turn. Thus the law is in a constant process of approximation to an ideal certainty, which by the nature of the case can never be perfectly attained at any given moment. Every one who has studied the law knows that the approximation is apt to be a

rough one, and is exposed to many disturbing causes. I hope to say something at a future time of the methods by which it is effected in the system of the Common Law. Meanwhile it is to be remembered that the political sciences do not claim to be exact in either a speculative or a practical point of view. For the practical purposes of a State governed according to law, that degree of certainty suffices which will satisfy the citizens that the law works on the whole justly and without favor; and in archaic societies not only is a pretty rough kind of certainty sufficient, but no other is possible.

Rules of law have to be applied to the facts ascertained by the tribunal. Now the facts are often in dispute; indeed, those cases are a small minority where there is a real difference between the parties, and that difference turns merely upon the application of the law to undisputed facts. Much of the work done by the machinery of justice consists in enforcing just claims to which there is no defence, but mere refusal or neglect to pay one's debts without compulsion of law does not constitute a real matter in difference. And the process of forming a judgment as to the truth of the facts, where conflicting accounts are offered, is itself an approximate one at best for human faculties. In early stages of legal institutions we find that there is hardly so much as a serious attempt in this direction; the matters at issue are disposed of by methods which seem to us at this day not only artificial and inadequate, but out of all relation to any grounds of reasonable conclusion. The task would indeed seem to have been thought above the power of mortals. Ordeal in its various forms is a direct appeal to supernatural aid in the supposed incompetence of human understanding. Proof by oath, where the oath is conclusive, — a procedure of which the mediæval "compurgation" is the best known example, — is the same thing in a milder form. Wherever and so long as the facts cannot be ascertained with any precision, there is no occasion for precise or elaborate rules of law. The law cannot be more finely graduated than the means of ascertaining facts; and the judicial investigation of facts with something approaching completeness and exactness dates only from relatively modern times. Hence the development of law is largely bound up with the development of procedure. As improved procedure enables the law to grapple with complex facts, the aspirations of lawyers and citizens are enlarged, and they are by no means content to aim at the minimum of certainty which will insure public acquiescence in the justice of

the State, and a tolerable average of obedience. On the contrary, they will aim — as men do in every science and art, when once they become seriously interested in it — at an ideal maximum. But even in the most advanced polity we shall find now and then that the subtilty of forensic and judicial thought outruns the possibilities of effectual inquiry and administration. Questions are sometimes put to juries which it is hardly possible for any one not learned in the law to see the point of.

In assuming a scientific character, law becomes, and must needs become, a distinct science. The division of science or philosophy which comes nearest to it in respect of the subject-matter dealt with is Ethics. But, though much ground is common to both, the subject-matter of Law and of Ethics is not the same. The field of legal rules of conduct does not coincide with that of moral rules, and is not included in it; and the purposes for which they exist are distinct. Law does not aim at perfecting the individual character of men, but at regulating the relations of citizens to the commonwealth and to one another; — and inasmuch as human beings can communicate with one another only by words and acts, the office of law does not extend to that which lies in the thought and conscience of the individual. The possible coincidence of law with morality is limited, at all events, by the range of that which theologians have named external morality. The commandment, "Thou shalt not steal," may be, and in all civilized countries is, legal as well as moral; the commandment, "Thou shalt not covet," may be of even greater importance as a moral precept, but it cannot be a legal one. Not that a legislator might not profess to make a law against covetousness, but it would be inoperative unless an external test of covetousness were assigned by a more or less arbitrary definition; and then the real subject-matter of the law would be, not the passion of covetousness, but the behavior defined as evincing it. The saying ascribed (it seems apocryphally) to Dr. Keate of Eton, "Boys, if you 're not pure in heart I 'll flog you," exemplifies in a neat form the confusion of external and internal morality. The judgment of law has to proceed upon what can be made manifest, and it commonly has to estimate human conduct by its conformity or otherwise to what has been called an external standard. Action, and intent shown in acts and words, not the secret springs of conduct in desires and motives, are the normal materials in which courts of justice are versed, and in the terms of

which their conclusions are worked out and delivered.[1] An act not otherwise unlawful in itself will not generally become an offence or legal wrong because it is done from a sinister motive, nor will it be any excuse for an act contrary to the general law, or in violation of any one's rights, to show that the motive from which it proceeded was good. If the attempt is made to deal with rules of the purely moral kind by judicial machinery, one of two things will happen. Either the tribunal will be guided by mere isolated impressions of each case, and therefore will not administer justice at all; or, which is more likely, precedent and usage will beget settled rule, and the tribunal will find itself administering a formal system of law, which in time will be as technical, and appeal as openly to an external standard, as any other system. This process took place on a great scale in the formation of the Canon Law, and on a considerable scale in the early history of English equity jurisdiction.

Besides and beyond the limitation of the field of law to external conduct, there are many actions and kinds of conduct condemned by morality which for various reasons law can either not deal with at all or can deal with only in an incidental and indirect manner. It would be the vulgarest of errors (as we have already hinted) to suppose that any kind of approval is implied in many things being left to the moral judgment of the community, and to such pressure as it can exercise. Law does not stand aside because lawyers or judges think lightly of such things, but because, whether from permanent or from transitory causes, the methods of legal justice are not appropriate for dealing with them, and the attempt to apply those methods would, so far as it could be operative at all, probably do more harm than good. At the same time rules of law may well have, in particular circumstances, an effective influence in maintaining, reinforcing, and even elevating the standard of current morality. The moral ideal present to lawgivers, lawyers, and judges, if it does not always come up to the highest that has been conceived, will at least be, generally speaking, above the common average of practice; it will represent the standard of the best sort of citizens. This is especially the case in matters of

[1] The exceptions are perhaps of an accidental and not very substantial kind, but, after all corrections and allowances, "malice" does sometimes in English law mean evil motive, such as personal enmity or vindictiveness. The general rule has been conspicuously affirmed by the House of Lords in Corporation of Bradford *v.* Pickles, 1895, A. C. 587; it remains to be seen whether the House will approve on the final appeal, now pending, the extent to which the exception is carried by the Court of Appeal in Flood *v.* Jackson, 1895, 2 Q. B. 21.

good faith, whether we look to commercial honesty or to relations of personal confidence. With few exceptions, the law has in such matters been constantly ahead not only of the practice, but of the ordinary professions of business men. We have similar results on a more striking scale when a law which is not indigenous brings in with it the moral standards on which it is founded. Thus a good deal of European morality has been made current in India by the Anglo-Indian codes; and European morality itself has been largely moulded not only by the teaching of the Christian Church, but by the formal embodiment of that teaching in both ecclesiastical and secular laws. The treatment of homicide by early English criminal law was founded on the extremely strict view taken by the Church of the guilt of blood-shedding; and the extinction of duelling in this country seems to be due, in no small part, to the steady refusal of English law to regard killing in a duel, even without any circumstances of treachery or unfairness, as anything else than murder. We are not speaking here of the mere fact that persons abstain from unlawful conduct through dread of the legal consequences, a fact which, taken by itself, has no moral significance at all.

Again, rules of law differ from rules of morality in excess as well as in defect. It is needful for the peace and order of society to have definite rules for a great many common occasions of life, although no guidance can be found in ethical reasoning for adopting one rule rather than another. There is no law of nature that prescribes driving on either the right or the left side of the road, as is plainly shown by the fact that our English custom to take the left side is the reverse of that which is observed in most other countries. But in a land of frequented roads there must be some fixed rule in order that people who meet on the road may know what to expect of one another. And, the rule being once fixed either way for the sake of general convenience, we are bound in moral as well as in legal duty to observe the rule as we find it. On much the same footing are the rules which require particular forms to be observed in particular transactions, for the purpose of making the proof of them authentic and easily found, or in the interest of the public revenue, or for other reasons. There are not many such cases in which the form actually imposed by the law can be said to be in itself the only appropriate one, or obviously much better than others that might be thought of. But, since it has been thought fit to require some form, it is necessary

that some one form should be authorized. Here too the choice between courses which in themselves were morally indifferent is determined by the law, and thenceforth it is the moral as well as the legal duty of every one concerned, if he will act as a good citizen and a prudent man, to do things in the appointed manner and form.

But there is more than this. As in many cases acts and conduct that are morally blameworthy must go quit of anything the law can do, so in many cases, on the other hand, persons are exposed, for reasons of public expediency, to legal responsibilities which may or may not be associated with moral fault, and which cannot be avoided even by the fullest proof that in the particular case the person who is answerable before the law was morally blameless. A man may, of course, make himself answerable by his own promise for many things independent of his moral deserts, or even wholly beyond his control: but we are here speaking of liability not accepted by the party's own act and consent, but imposed by a rule of law which does not depend on any one's consent for its operation. Thus a man is liable in most civilized countries for the wrongful acts and defaults of his servants in the course of their employment, whatever pains he may have taken in choosing competent servants and giving them proper instructions. Obviously this is a hard rule for the employer in many cases; but its existence in every system of law shows that in the main it is felt to be just. Again, both Roman and English law have made owners of buildings[1] responsible, in various degrees, for their safe condition as regards passers by in the highway, or persons entering them in the course of lawful business: and this without regard to the amount of the owner's personal diligence in the matter. Again, questions often arise between two innocent persons, of whom one or other must bear the loss occasioned by the wrongful act of some one from whom redress cannot be obtained; as when a man who has obtained goods by fraud from their owner sells them to an unsuspecting third person, and then absconds, leaving nothing behind him. Here the original owner and the buyer may be equally free from fault, but they cannot both have the goods, and their price cannot be recovered. Hardship to one or the other is inevitable.

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[1] This is by no means the full measure of the rule in our law. For simplicity's sake, only part of it is now stated.

In all these cases the loss or damage, as between the two innocent parties who are left face to face, may be considered as accidental. The rule of law has to determine as best it can on which side the loss should fall; and since by the hypothesis neither party has incurred moral blame, and this is the very cause of the difficulty, it is plain that the rules of ordinary social morality will afford no guidance. We have to resort either to considerations of general public expediency, or, if no obvious balance of convenience appears either way, to the purely technical application of rules already settled in less obscure matters. And this last method is not a mere evasion of the problem, but is a reasonable solution so far as no stronger reason can be assigned to the contrary. For the principle of certainty requires that a rule once settled shall be carried out to its consequences when no distinct cause is shown for making an exception or revising the rule itself. If any sense of hardship to the individual citizen remains after these considerations have been weighed, and it has also been observed that citizens have an equal chance of benefit as well as burden under special rules of this kind, it may be said that exposure to this kind of liability is part, and not a large part, of the price which the individual has to pay the State for the general protection afforded by its power, and the general benefit of its institutions.

Thus neither the work nor the field of legal science can be said to coincide with those of any other science; and the development of this, as of all other distinct branches of science, can be carried on only by the continuous effort of persons who make it the chief object of their attention in successive generations. This has been recognized in the institutions, both practical and academical, of all civilized nations. A civilized system of law cannot be maintained without a learned profession of the law. The formation and continuance of such a learned class can be and has been provided for, at different times and in different lands, in various ways, which it does not now concern us to mention in detail. It is not necessary for this purpose that the actual administration of justice should be wholly, or with insignificant exceptions, in the hands of persons learned in the law, though such is the prevailing tendency of modern judicial systems. It is enough that the learned profession exists, and that knowledge of the law has to be sought, directly or indirectly, in the deliberate and matured opinion of its most capable members. And the activity of modern legislation makes little or no difference to this; for we are not now speaking of the gen-

eral policy of the lawgiver, which in a free country is and must be determined not by any one class, but by the people through their representatives. The office of the lawyer is first to inform the legislature how the law stands, and then, if change is desired, (as to which he is entitled to his opinion and voice like any other citizen,) to advise how the change may best be effected. Every modern legislature is constantly and largely dependent on expert aid of this kind. A well framed Act of Parliament, whatever amount of novelty it may contain, is as much an application of legal science as the considered judgment of a court. Legislation undertaken without legal knowledge is notoriously ineffectual, or, if not ineffectual, apt to create new troubles greater than any which it cures. There is no way by which modern law can escape from the scientific and artificial character imposed on it by the demand of modern societies for full, equal, and exact justice.

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